

No. 84132-2

SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE THE TERMINATION OF D.R. AND A.R.,  
Minor Children

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*AMICUS CURIAE* BRIEF OF THE WASHINGTON  
STATE PSYCHOLOGICAL ASSOCIATION

IN SUPPORT OF PETITIONERS

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**A. IDENTITY AND INTEREST OF *AMICI CURIAE***

The Washington State Psychological Association (“WSPA”) is a nonprofit scientific and professional organization founded in 1947. WSPA represents more than 700 members and affiliates, including the majority of psychologists holding doctoral degrees from accredited universities.

RCW 18.83.010(1) defines the "practice of psychology" to mean:

the observation, evaluation, interpretation, and modification of human behavior by the application of psychological principles, methods, and procedures for the purposes of preventing or eliminating symptomatic or maladaptive behavior and promoting mental and behavioral health.

As a result, the mission of WSPA is to support, promote and advance the education, science and practice of psychology in the public interest.

WSPA is recognized at the national level of psychology for its dedication to promoting the public interest. Whenever WSPA attempts to promote the public interest, it relies upon the most recent scientific evidence to establish what actions would enhance the mental and behavioral health of Washington citizens.

WSPA has reviewed the scientific evidence regarding the deprivation of counsel to children in termination of parental rights (“TPR”) proceedings, and has found compelling evidence that demonstrated the provision of legal representation leads to better

outcomes. As a matter of public interest, deprivation of counsel to children in TPR proceedings must end.

**B. STATEMENT OF THE CASE**

This Amicus Brief incorporates by reference the Statement of the Case in the Appellant Children's Opening Brief.

**C. THE NATURE OF SCIENTIFIC EVIDENCE AND ITS PRESENTATION IN THIS BRIEF**

WSPA, the state's leading association of psychology professionals and behavioral scientists, have prepared this brief to provide the Court with a comprehensive and balanced review of the scientific and professional literature pertinent to the issues before the Court. In preparing this brief, WSPA has been guided solely by criteria related to the scientific rigor and reliability of studies and literature, not by whether a given study supports or undermines a particular conclusion.

Scientific research has established that the provision of counsel to children during dependency and TPR adjudications increases the positive outcomes for the children. In the informed judgment of WSPA, this brief presents an accurate and balanced summary of the current state of scientific and professional knowledge about these issues.

To assist the Court, we briefly explain the professional standards we have followed for selecting individual studies and literature for citation and for drawing conclusions from research data and theory:

(1) We are ethically bound to be accurate and truthful in describing research findings and in characterizing the current state of scientific knowledge.

(2) We rely on the best empirical research available, focusing on general patterns rather than any single study. Whenever possible, we cite original empirical studies and literature reviews that have been peer reviewed and published in reputable academic journals. Not every published paper meets this standard because academic journals differ widely in their publication criteria and the rigor of their peer review. We do cite technical reports, which typically are not subject to the same peer-review standards as journal articles. When journal articles report research, they employ rigorous methods, are authored by well established researchers, and accurately reflect professional consensus about the current state of knowledge. In assessing the scientific literature, we have been guided solely by criteria of scientific validity, and have neither included studies merely because they support, nor excluded credible studies merely because they contradict, particular conclusions.

(3) Before citing any study, we critically evaluated its methodology, including the reliability and validity of the measures and tests it employed, and the quality of its data-collection procedures and statistical analyses. We also evaluated the adequacy of the study's sample, which must always be considered in terms of the specific research question posed by the study.<sup>1</sup> In this brief, we note when a study's findings should be regarded as tentative because of a particularly small or selective sample, or because of possible limitations to the procedures used for measuring a key variable.

(4) No empirical study is perfect in its design and execution. All scientific studies can be constructively criticized, and scientists continually try to identify ways to improve and refine their own work and that of their colleagues. When a scientist identifies limitations or qualifications to a study's findings (whether the scientist's own research or

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<sup>1</sup> To confidently describe the prevalence or frequency with which a phenomenon occurs in the population at large, for example, it is necessary to collect data from a probability sample (often referred to in common parlance as a "representative sample"). By contrast, simply to document that a phenomenon occurs, case studies and nonprobability samples are often adequate. For comparisons of different populations, probability samples drawn from each group are desirable but not necessary and rarely feasible. Hence, researchers often rely on nonprobability samples that have been matched on relevant characteristics (e.g., educational level, age, income). Some groups are sufficiently few in number — relative to the entire population — that locating them with probability sampling methods is extremely expensive or practically impossible. In the latter cases, the use of nonprobability samples is often appropriate; when numerous studies with different samples reach similar conclusions, we place greater confidence in those conclusions than when they are derived from a single study. We therefore rely as much as possible on empirical findings that have been replicated in multiple studies by different researchers.

that of a colleague), or when she or he notes areas in which additional research is needed, this should not necessarily be interpreted as dismissing or discounting of the research. Rather, critiques are part of the process by which science is advanced.

(5) Scientific research cannot prove that a particular phenomenon never occurs or that two variables are never related to each other. When repeated studies with different samples consistently fail to establish the existence of a phenomenon or a relationship between two variables, researchers become increasingly convinced that, in fact, the phenomenon does not exist or the variables are unrelated. In the absence of supporting data from prior studies, if a researcher wants to argue that two phenomena are correlated, the burden of proof is on that researcher to show that the relationship exists.

#### **D. ARGUMENT**

##### **1. ATTORNEY-CHILD REPRESENTATION IS IN THE BEST INTEREST OF THE CHILD**

Statutory rights to counsel for children in dependency and TPR cases exist in most states. LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 FAM. CT. REV., 605-11 (2009). Research results have shown that legal representation of children in dependency and TPR cases lead to faster resolution of the

cases and increased awareness among the children about their legal rights. LUCY JOHNSTON-WALSH & SUSAN KINNEVY, ASSESSING THE QUALITY OF CHILD ADVOCACY IN DEPENDENCY PROCEEDING IN PENNSYLVANIA, 1-72 (October 2010), *at* [http://www.jlc.org/images/uploads/Assessing\\_Quality\\_of\\_Child\\_Advocacy.pdf](http://www.jlc.org/images/uploads/Assessing_Quality_of_Child_Advocacy.pdf).

The paramount concern in dependency and TPR cases is the best interest of the child. RCW 13.34. Pursuant to RCW 13.34.190(2), the trial court must consider the best interests of the child before terminating parental rights. Not only would the best interest of children be served through legal representation in TPR proceedings; but also, counsel for children would be in the best position to assist the trial court with its determination of what would be in the child's best interest moving forward – return home, guardianship, or adoption. The Washington State Psychological Association finds that providing counsel to dependent children who are the subject of TPR proceedings is in the best interests of the children.

**a. Effective Representation of Children Leads to Better Life Outcomes**

When children are represented by lawyers who provide advocacy rather than just investigative services (such as Guardian *ad litem* (“GAL”) and court appointed special advocate (“CASA”) services), evidence

shows that more accurate determinations are made about the dependency issues, and permanency for children and families occurs in a more expeditious manner. In a matched controlled study of the Legal Aid Society of Palm Beach County's Foster Children's Project (FCP), children represented by FCP had significantly higher rates of permanent placements (adoptions and long-term guardianships) than children not served by FCP. Andrew Zinn, et al., *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County*, CHICAGO: CHAPIN HALL CENTER FOR CHILDREN AT THE UNIVERSITY OF CHICAGO (2008).

FCP fielded 10 attorneys, two permanency planners, and support personnel. Each attorney carried a caseload of approximately 35 children during the study. The data suggested that the trained, well-supported staff lawyers provided individualized representation that made a difference. Greater advocacy resulted in a greater number of motions filed in FCP cases with no greater proportion of motions being denied (the motions were meritorious), the occurrence of more frequent status conferences, and a greater number of service referrals.

Additionally, a small study collecting qualitative data occurred. FCP child clients developed an understanding of the legal process, voiced



their concerns readily, and maintained connections with siblings and parents.

Data from Pennsylvania corroborated that providing children's lawyers with professional support leads to better outcomes. LUCY JOHNSTON-WALSH & SUSAN KINNEVY, ASSESSING THE QUALITY OF CHILD ADVOCACY IN DEPENDENCY PROCEEDING IN PENNSYLVANIA, 1-72 (October 2010), *available at* [http://www.jlc.org/images/uploads/Assessing\\_Quality\\_of\\_Child\\_Advocacy.pdf](http://www.jlc.org/images/uploads/Assessing_Quality_of_Child_Advocacy.pdf). The authors suggested that when represented by attorneys, the presence of the youth in court increases: accountability among the parties to follow through with their responsibilities; the gravity of the context that focuses the parties to work efficiently and reduce delays; the understanding for the child about the role of their attorney and the legal process their parents must follow; and the efficacy of the process to achieve permanency for the child.

**b. Ineffective or No Attorney-Child Representation Leads to Poorer Outcomes**

Without children's due process rights being protected in TPR cases, many possible harmful outcomes are likely to occur and the children's best interests are not served. For instance, children often lose their families. Instead they must endure the uncertain outcomes related to a lack of permanent placements that result when placed in foster care and

group home placements. M.E. Courtney, et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Ages 23-24*, CHAPIN HALL CENTER FOR CHILD., at <http://fosteringmediaconnections.org/wp-content/uploads/2010/08/MW-Wave-4-full-report1.pdf>. They are permanently disconnected from their biological families. If such children violate the TPR order, they run the risk of contempt and detention.

Appointments of a GAL or CASA pursuant to RCW 13.34.100 for children involved in dependency or TPR cases do not adequately serve the interests of those children. The volunteers and/or professionals who engage in these roles tend to adopt a rigid adherence to the best interest standard at the cost of ignoring the child's voice. Annette Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV., 573-635 (2008).

The FCP study showed that attorneys representing children do not substitute their judgment about their clients' views by focusing on the best interest standard. By contrast, when merely provided a non-attorney GAL or volunteer CASA, children are more likely to languish in foster care longer or experience a greater number of placements. ANDREW ZINN, ET AL., *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County*, CHICAGO: CHAPIN HALL CENTER FOR CHILD. AT THE U. OF CHICAGO (2008). Longer periods in foster care and greater numbers

of placements are linked to worse mental health outcomes for the children.

NORMAN GARMEZY & M. RUTTER, *STRESS, COPING, AND DEVELOPMENT IN CHILDREN* 43-84 (NY: McGrawHill 1983); JOSEPH GOLDSTEIN & ANNA FREUD, *THE BEST INTEREST OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* (NY: Free Press 1986).

Once a child is declared dependent, the child will likely be placed into foster care for months if not years, moved from place to place, and if the TPR is granted, may be permanently separated from his or her biological family. The outcomes for youth aging out of foster care are quite grim. Longitudinal research that compared a large sample of young adults who aged out of the foster care system (Chapin Hall) with a control group of young adults (National Longitudinal Study of Adolescent Health) showed that the Chapin Hall group's health, well-being, and life outcomes were significantly poorer, as they were much more likely: to not obtain a high school diploma or GED; to not gain employment; to earn much lower annual income; to sustain lower economic security; to suffer from higher rates of physical health problems, mental illness, substance abuse, and behavioral problems; to experience greater rates of incarceration and criminal victimizations; to engage in unprotected sex, with a much earlier parenthood and with much more child welfare involvement; and to feel hopeless about their futures. M.E. Courtney, et al., *Midwest Evaluation of*

*the Adult Functioning of Former Foster Youth: Outcomes at Ages 23-24*,  
CHAPIN HALL CENTER FOR CHILD., *available at* <http://fosteringmediaconnections.org/wp-content/uploads/2010/08/MW-Wave-4-full-report1.pdf>.

It appears that the general intention of the GAL and CASA programs is to ensure safe and permanent placements, while shortening the time spent in the system through advocating for the child's best interest. However, the data suggest that the outcomes do not meet the stated goals. In a commissioned research study conducted by Caliber Associates for the National CASA, sound methodology was used to control for the differences in risk factors (eight separate factors, *see*, p. 40 of the report) for nearly three thousand children. Caliber Ass'n, EVALUATION OF CASA REPRESENTATION: FINAL REPORT (2004) (*summary available at* [http://nc.casaforchildren.org/files/public/community/programs/Statistics/caliber\\_casa\\_study\\_summary.pdf](http://nc.casaforchildren.org/files/public/community/programs/Statistics/caliber_casa_study_summary.pdf)). Comparisons were made in children's cognitive and academic skills, prosocial behavior, relationships with adults, future expectations, and children's behavioral and emotional problems. The following outcomes were documented: Children with CASAs were nearly five times more likely to be placed in foster care rather than reunified or placed in kinship care than children without CASAs; children without CASAs were found to be just as safe and to have similar levels of well-being as children with CASAs. CASAs, who are

generally well-meaning volunteers, most of whom are fully employed in other jobs, are provided training less than 45 hours on average to engage in the CASA work. No further longitudinal outcome research on CASA efficacy has been conducted since the publication of the Caliber study in 2004; the full 2004 report is no longer available on CASA's website.

The Pennsylvania study found that a consensus about how lawyers should represent children is beginning to emerge:

Lawyers can best comply with the Rules of Professional Conduct by advancing their clients' expressed wishes. This view also requires lawyers to develop relationships of trust with their clients, to fulfill their counseling functions, and to help the child client develop a goal that has a reasonable chance of being accepted by the court.

LUCY JOHNSTON-WALSH & SUSAN KINNEVY, ASSESSING THE QUALITY OF CHILD ADVOCACY IN DEPENDENCY PROCEEDING IN PENNSYLVANIA, 1-72 (October 2010), *available at* [http://www.jlc.org/images/uploads/Assessing\\_Quality\\_of\\_Child\\_Advocacy.pdf](http://www.jlc.org/images/uploads/Assessing_Quality_of_Child_Advocacy.pdf) (*citing* MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS (A.B.A.), *available at* [http://www.abanet.org/litigation/standards/docs/child\\_modelact.pdf](http://www.abanet.org/litigation/standards/docs/child_modelact.pdf)). Yet, rarely are the voices of Washington's children heard. Instead, professionals who are involved in dependency and TPRs are focused upon other issues than what the children whose lives they are investigating want.

**c. DSHS Caseworkers, GALs, and CASAs do not Ameliorate the Need for Children's Attorneys.**

The Department of Social and Health Services ("DSHS") assigned case workers, lay GALs or CASAs primarily serve in investigatory capacities and are not required to, nor do they, fully represent the interests of the children as their attention is drawn to other details and measures than the objectives of the children involved in TPRs. These investigations can result in advocacy by lay GALs and CASAs that is adverse to those espoused by the children at the heart of these cases, and often such goals fail to make meaningful changes for the children and their families. A study of 595 children involved in investigations of suspected child maltreatment showed that:

27.6% (164) experienced an investigation for suspected child maltreatment between ages 4 and 8 years. At age 8 years, investigated subjects were not perceptibly different from non-investigated subjects in social support, family functioning, poverty, maternal education, or child behavior problems after adjusting for baseline risk factors.

K.A Campbell, et. al., *Household, Family, and Child Risk Factors After an Investigation for Suspected Child Maltreatment: A Missed Opportunity for Prevention*, 164(10) PEDIATRIC ADOLESCENT MED. 943-49 (2010).

Several factors led to such outcomes: case workers focused on the investigation of the allegations rather than meaningful interventions for the family; parents resisted the case workers because of the blurring of

boundaries between investigation and remediation of parental deficits; and poor case worker interdisciplinary communication occurred with the other professionals (e.g., physicians, teachers, mental health service providers) involved with the family subsequent to the investigation. The authors concluded that “the lack of change in household characteristics known to be associated with repeat abuse suggests that CPS intervention represents a missed opportunity to improve outcomes for children at high risk for future maltreatment, medical problems, and behavioral problems” *Id.* at 948.

GALs or CASAs do not believe that their role should include the advocacy of the children’s interests. In fact, as occurred in D.R.’s case, the State admitted that “the GAL did not profess that she had the ability to advocate for [D.R’s] position.” State’s Mot. To Reverse and Remand 1-3.

**d. Through their Legal Counsel, Children are in the Best Position to Assist the Trial Court with its Determination of their Best Interests.**

RCW 13.34 is replete with references to the court being guided by the best interest of the child. Foster placements must be in the best interest of the child. RCW 13.34.265. A guardianship may only be entered if in the best interest of the child. RCW 13.34.237. A guardianship may be terminated if in the child’s best interest. RCW 13.34.233. The trial court may only enter an order terminating the parent-

child relationship pursuant to a finding that termination is in the best interests of the child. RCW 13.34.190. The trial court must find by a preponderance of the evidence that termination is in the child's best interest. See *In re Ramquist*, 52 Wn. App. 854, 860, 765 P.2d 30 (1988).

The studies cited above show that it is in a child's best interest to have a voice to advocate for their position, whether that would be to maintain the parent-child relationship, to terminate in order to achieve permanency through adoption or open adoption, or for a guardianship to be created. Having attorneys improved children's health, well-being, and life outcomes, which certainly serves the children's best interest.

When the trial court must consider the best interests of the child, it would be helpful to have input from the children themselves about what they feel would be in their own best interests. Children subjected to these proceedings may or may not want to negotiate an open adoption agreement to maintain contact with their biological parent(s). Without an attorney, the child's legal position would not be represented.

Permanency is achieved faster through advocacy on behalf of children. Whether a child's position supports termination or maintenance of the parent-child relationship, the best interest of the child would be most served by allowing children to have a voice to communicate what they believe is in their own best interests.



**2. CHILDREN HAVE BOTH SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE 1, SECTION 3 OF THE WASHINGTON CONSTITUTION, AND ARE THEREFORE ENTITLED TO REPRESENTATION IN TERMINATION PROCEEDINGS**

Children's constitutional rights do not mature and come into being only when the child attains the age of majority. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976). "[T]he constitutional protections afforded to the parent-child relationship extend to the child, protecting his or her right to maintaining a relationship with a parent." *In re L.B.*, 121 Wn. App. 460, 485, 89 P.3d 271, 284 (2004).

Children's rights to be heard and represented by counsel in TPRs, which threaten to extinguish their parent-child relationships or to maintain that relationship where it would interfere with a child's ability to otherwise achieve permanency, are established under the Substantive and Procedural Process Clauses of the Fourteenth Amendment to the U.S. Constitution and Article I, Section 3 of the Washington Constitution.

**a. Children have a Fundamental Liberty Interest in Advocating For or Against Their Familial Relationships.**

Children enjoy a fundamental right to maintain and pursue a parent-child relationship under the Substantive Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and Article 1, Section 3 of the Washington Constitution. It is well established that “freedom of choice in matters of ... family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.” *Cleveland Bd. Of Educ. V. LaFleur*, 414 U.S. 632, 639-40, 94 S. Ct. 791, 39 L.Ed. 2d 52 (1974). The United States Supreme Court recognized that familial rights are not limited to parents but should extend to the entire family, including children. *Moore v. City of East Cleveland*, 431 U.S. 494, 504-05, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977). This Court has noted that “it would be ironic to find [that] issues of parent-child ties are of constitutional dimension when the parents’ rights are involved but not when the child’s are at stake.” *State v. Santos*, 104 Wn.2d 142, 143, 702 P.2d 1179 (1985).

The definition of family extends beyond its nuclear or biological members. *Moore v. City of East Cleveland*, 431 U.S. at 504. The importance of family “stems from the emotional attachments that derive from the intimacy of daily association.” *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977). In *Smith*, the Supreme Court stated that “no one would seriously dispute that a deeply loving and interdependent

relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. *Id.*

Equal to a child having a liberty interest in maintaining a biological parent-child relationship is the child's individual liberty interest in advocating for the termination of that biological relationship, and advocating the child's plan for permanency. Under RCW 13.34.180, a child should have an equal right to file for termination, and should have an attorney to petition for termination, should the State fail to do so to advance the child's permanent plan.

The child as an individual has a liberty interest, separate and distinct from the biological parents, in whether the parent-child relationship continues or ends. The child has as much right to advocate for the end of the relationship as he or she has to argue for its maintenance.

**b. Children may not be Deprived of their Liberty Interests Without Due Process, which Mandates the Appointment of Counsel to Advocate Children's Express Preferences.**

When a state takes action, even through judicial means, to deprive an individual of a protectable interest in life, liberty, or property, then that individual is entitled to procedural due process. *See Bd. Of Regents of State Colleges v. Roth*, 408 U.S. 564, 570-73, 92 S.Ct. 2701, 33 L. Ed. 2d 548 (1972); *see also Shelley v. Kraemer*, 334 U.S. 1, 14, 68 S. Ct. 836, 92

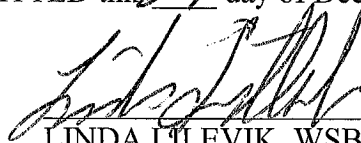
L. Ed. 1161 (1948). The Supreme Court has established that familial relationships are a liberty interest encompassed by procedural due process. *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 842-43, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977). Washington courts recognize that a meaningful opportunity to be heard encompasses a right to counsel. *In re Welfare of Lusier*, 84 Wn.2d 135, 139, 524 P.2d 906 (1974); *In re Welfare of Myricks*, 85 Wn.2d 252, 254-55, 533 P.2d 841 (1975). Therefore, children's substantive right to pursue relationships with their parents, or to request the relationships be severed, mandates procedural due process.

Both the state and children have interests in accurate determinations being made and permanency being achieved expeditiously. The state's interest in protecting the welfare of children is not currently being advanced by refusing to provide counsel for children. Unrepresented by counsel, children are languishing in foster care after losing their parent-child relationships. Young adults aging out of foster care are less likely to have a high school diploma or GED, less likely to gain employment, suffer from higher rates of physical and mental health problems, experience greater rates of incarceration, and become parents themselves at an earlier rate, all of which results in additional public costs.

**E. CONCLUSION**

Termination proceedings hinge on what is in the best interest of the child. Absent counsel to advocate for the children's express wishes, there is no mechanism to ensure that what children view as in their own best interest will be heard. Denying a child the constitutional right to an attorney to advocate for the child's best interest does a disservice to the very child the court is mandated to protect. The Washington State Psychological Association finds that providing counsel to children is in the best interest of the child.

RESPECTFULLY SUBMITTED this 27 day of December, 2010.



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**DECLARATION OF SERVICE**

BY RONALD R. CARPENTER

I declare, under penalty of perjury, under the laws of the State of  
Washington, the following: CLERK

1. I am over the age of eighteen and employed as a legal assistant at Carey & Lillevik, PLLC.
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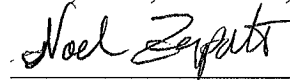
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2. On the date below, I arranged service of the foregoing document by ABC Legal Messenger and via email to:

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Signed this 27<sup>th</sup> day of December, 2010, at Seattle, King County,  
Washington.



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